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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 301

ELMER J. DAY, *Petitioner*,

v.

NORTHWEST DIVISION 1055 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

REPLY BRIEF

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Respondents' brief in opposition patently fails to meet the main issues tendered by our petition for certiorari. It may be helpful to the Court to point out some of the respects in which that brief misconceives or sidesteps the relevant issues.

1.

Respondents' first and most extended argument in support of the decision below (see pp. 9 to 12 of their brief) rests on the false premise that petitioner's "entire position rests upon the contention that the Union conduct at bar cannot be considered an unfair labor practice or within the jurisdiction of the Board." In fact, the petition for certiorari clearly states, with respect to the Union conduct involved, that "it is not necessary to decide whether it is 'arguably' an unfair labor practice" (see p. 13), and places primary reliance on the proposition that, where the policy of Section 301(a) of the Labor Management Relations Act is violated:—

> "federal and state courts have jurisdiction, even where the conduct 'not only arguably but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board.' *Smith* v. *Evening News Association*, 371 U.S. 195; *Humphrey* v. *Moore*, 375 U.S. 335; *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261." (see p. 10)

Respondents, in addressing themselves to the Section 301 issue (pp. 12-15 of their brief), profess not to see the relevance of *Humphrey* v. *Moore* and *Smith* v. *Evening News Association*, and argue that this case was pleaded and tried exclusively on a tort theory and that there was no conceivable collective bargaining agreement violation.

These contentions are incompatible with this Court's adjuration that Section 301 "is not to be given a narrow reading," *Smith* v. *Evening News Association*, 371 U.S. 195 at 199, on which basis the Court interpreted the section as permitting suits by employees to vindicate their individual rights. Nor do they square with the notion that "substance and not form must govern," see Justice Goldberg's concurring opinion in *Humphrey* v. *Moore*, 375 U.S. 335 at 352, for which reason it was considered immaterial

that the complaint before the state court made no reference to Section 301 as the source of the action.

These contentions are further effectively answered by the dissenting opinion below. Here, after pointing out that *Smith* v. *Evening News Association* gave an individual union member the right to sue for his injuries, and that *Humphrey* v. *Moore* conferred on him the right to sue his union for breach of the bargaining agreement between the employer and the union, the dissenters said:—

> "A bargaining agreement entered into by the union is for the benefit of both the employees and the employer, and in the matter before us we must assume the union shop clause was considered beneficial to both. It appears from the allegations of plaintiff's complaint that defendants did cause a breach of the bargaining agreement. Therefore, the courts of this state have concurrent jurisdiction with that of the National Labor Board to determine and adjudicate the issues here presented" (see Petition, App. B, p. 38).

Respondents further argue that petitioner should have availed himself of a grievance arbitration procedure (see pp. 13 and 14 of their brief) and should have exhausted internal union procedures (see p. 16). These issues were not passed on by the Oregon Supreme Court, which decided this case solely on the basis of pre-emptive jurisdiction. Such procedures are clearly inapplicable here, where a person expelled from union membership is exercising his right to sue for damages. The grievance arbitration procedure discussed on page 14 of respondents' brief (which was unsuccessfully pleaded to the Trial Court) and the statutory proviso quoted in footnote 13, apply only to suits against employers and not to suits against unions. Exhaustion of union appellate procedures (an argument likewise rejected in the Trial Court) is a relevant consideration where an employee seeks reinstatement, not where, as here, he has been made a stranger to the Union and is pursuing his remedy in damages. Most significantly, an appeal to the Union which would have been a futile gesture cannot be regarded as pre-requisite to the mainteance of a suit.

Respondents' proposition that this case involves lawful concerted activity (pp. 14-15), even if assumed to be relevant to a Section 301 action, is erroneous for reasons that will be set forth on pages 5 and 6, below.

2.

Even were one to assume that petitioner's cause of action was predicated entirely on tortious conduct and did not involve a violation of a collective bargaining agreement, the state courts would, neverthless, have jurisdiction over this proceeding. A basic support for this proposition advanced in our petition was Section 603(a) of the Labor Management Reporting and Disclosure Act of 1959.

Since Section 603(a) is merely declaratory of a Congressional intention to preserve state law remedies otherwise available to injured employees, it is difficult to understand the so-called "procedural ground", raised by respondents on page 16 of their brief. Respondents' only argument directed specifically to Section 603(a) is to the effect that, because of Congressional pre-emption of the field, no state remedy is available. In addition to being an obvious begging of the question, this argument has already been refuted in the first section of this brief, and will be further shown to be erroneous in the following section. At no point does respondents' brief come to grips with the issue posed in our petition (see p. 9) and in the dissenting opinion—that the Congressional purpose in enacting Section 603(a) was to prevent the injustice of denying damages to an injured workman for his injuries and to avoid creating a "no-man's-land for the individual workman" (see Petition, App. B, pp. 44, 45).

3.

As indicated at the outset of this brief, the propriety of the State Court's assumption of jurisdiction in this case does not depend on whether the controversy in question is

within the jurisdiction of the Board; the basic issue is whether it is within the pre-emptive jurisdiction of the Board to the exclusion of alternative remedies.

In evading this issue, respondents rely on a bobtailed statement of the relevant facts. Their brief ignores the Union's involvement in the illegal "check-off" of petitioner's wages, the fact that petitioner's suspension from membership was part of the Union's general campaign of intimidation and that it was attributable to the ill-will borne petitioner for his conduct in protesting this illegal activity and reflected a desire to make an example of him. The Union's activities were in furtherance of a purpose prohibited by a penal statute, Section 302(a) of the Taft-Hartely Act. Accordingly, independently of the other grounds urged in our petition, the Union's activity cannot be regarded as "federally protected activity" and, consequently, is not subject to the pre-emptive jurisdiction of the National Labor Relations Board. See Justice Harlan's concurring opinion in *San Diego Building Trades Council* v. *Garman*, 359 U.S. 236 at 250 *et seq.*

In their effort to counter petitioner's view that this dispute is an internal one between the Union and its members, respondents blur the elementary and long-established distinction between the substantive acts underlying a cause of action, and the damages consequent upon those acts. This cause of action is based solely on the acts of the Union and its officers in depriving petitioner of union membership and, as in *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, involves an essentially internal union dispute. Moreover, the loss of monetary and other rights caused petitioner by the Union's illegal acts (which are set forth on page 9 of the petition) are damages flowing directly from the termination of his Union membership.

To the extent that this dispute "was focused on purely internal union matters, i.e., on relations between the indi-

vidual plaintiff and the union not having to do directly with matters of employment," *Association of Journeymen* v. *Borden*, 373 U.S. 690 at 697, State jurisdiction may validly be exercised. This was the case in *Gonzales*, which like the present case, concerned union membership rights, whereas, *Borden*, *Perko* and *Garmon*, the cases relied on by respondent and the court below, did not focus on purely internal union matters. *Borden* and *Perko* involved the efforts of a union to enforce a union working rule, and *Garmon* concerned a union's engaging in peaceful recognition picketing. It should be noted further that both of these activities involve conduct that is clearly either protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act. Moreover, in none of these three cases had the employee, as here, applied to the National Labor Relations Board and been turned down. Here, where the Board has declined jurisdiction, it can no longer be urged that the case is "arguably" before the Board.

4.

Respondents' brief concedes (see p. 8, fn. 7) that the decision of the Oregon Supreme Court below is at variance with that of the Supreme Court of Idaho in *Lockridge* v. *Amalgamated Association*, 84 Idaho 201, 369 P. 2d 1006. It also conflicts with the decision of the Pennsylvania Supreme Court in *Local 2* v. *Masters, Mates & Pilots*, 414 Pa. 277, petition for certiorari filed, Docket No. 299, July 18, 1964. The decision below is inconsistent with the legislative history and policy of the Taft-Hartley Act, as set forth by the Fourth Circuit in *Parks* v. *International Brotherhood of Electrical Workers*, 314 F. 2d 886, cert. denied, 372 U.S. 976, and of the Landrum-Griffin Act, as set forth by the Third Circuit in *Rekant* v. *Shoctay-Gasos Union, Local 446*, 320 F. 2d 271. Finally, as stressed in this brief, the decision below conflicts with the legal principles set forth in *Humphrey* v. *Moore* and *Smith* v. *Evening News Association*.

From the above, it would seem clear that this case involves issues of substantial importance in the administration of Federal labor legislation and in the safeguarding of private rights from arbitrary group action.

Respectfully submitted,

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